

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

W.L. RITTER

E.S. WHITE

B.G. FILBERT

UNITED STATES

v.

**Johan V. KASKELA
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200700133

Decided 10 October 2007

Sentence adjudged 25 September 2001. Military Judge: S.M. Immel. Staff Judge Advocate's Recommendation: Col W.D. Durrett, Jr., USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, MAG-39, 3d MAW, Camp Pendleton, CA.

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
LCDR GUILLERMO ROJAS, JAGC, USN, Appellate Government Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a special court-martial composed of a military judge. Pursuant to his pleas, the appellant was convicted of wrongful use of ecstasy and breaking restriction. His offenses violated Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The military judge adjudged a sentence of confinement for thirty days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises two assignments or error, claiming: (1) the appellant's right to speedy post-trial review was violated by unreasonable delay in post-trial processing; and (2) the Government should be required to cause another record of trial to be prepared.

We have carefully examined the record of trial, the appellant's two assignments of error, and the Government's

response. We find the appellant was denied his right to timely post-trial processing of his case. Following our corrective action, we conclude the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

The appellant contends that the 1,967-day delay in the post-trial processing of his case warrants relief. We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

In the instant case, the delay from the date of trial to docketing at this court was over five years, or 1,967 days. Although the convening authority acted on the case on 23 January 2002, the record was not docketed at this Court until 13 February 2007. We find this delay to be facially unreasonable, triggering a due process review.

We balance the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, the Government offers no excuse for the overall delay, or for the fact that it took 1,847 days to forward the record to this Court after the convening authority had acted on the case. With regard to the third factor, the appellant did not assert his right to timely post-trial review until filing his brief with this Court.

Regarding the fourth factor, the appellant submitted a declaration claiming he was not hired by GM Powertrain and Corning, Inc. because he did not have a DD-214. He also claims in general terms that he could not gain employment due to his lack of a DD-214. The appellant further asserts that he has developed "mental problems" for which he cannot receive

treatment at a Veteran's Administration (VA) medical facility because he has not been discharged from the Marines Corps. He acknowledges that, despite not having his DD-214, he was hired by a security company and a casino, and was admitted to college.

The appellant has not provided any evidence to support his declaration. Additionally, while the declaration provides information on events in the appellant's life since his court-martial, it contains insufficient detail to permit the Government to verify or rebut his claims regarding prejudice. For example, the declaration provides little or no information regarding dates when the appellant applied for and was denied employment and no contact information for the people with whom he dealt at GM Powertrain and Corning. Consequently, we find the appellant's claim of prejudice both speculative and conclusory, and reject his claim of prejudice on that basis, without ordering a factfinding hearing. See *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990).

We therefore find no specific prejudice resulting from the post-trial delay in this case. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice.

Finding no due process violation, we nonetheless possess authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We conclude that the post-trial delay in this case does affect the "findings and sentence [that] 'should be approved' based on all the facts and circumstances reflected in the record." *Tardif*, 57 M.J. at 224. Accordingly, we conclude that approving a sentence which does not include a bad-conduct discharge is appropriate in this case. We view the extraordinarily long period of delay, the absence of any explanation by the Government for the delay, the relatively minor and simple nature of this case, and the appellant's attempts to determine his discharge status as described in his declaration as the most significant factors in our decision to grant relief using our Article 66, UCMJ authority.

Preparation of a New Record of Trial

In his second assignment of error, the appellant claims that the Government should cause a new record of trial to be prepared because the original record was lost. We disagree.

The appellant asserts that the Government has not complied with R.C.M. 1104(c), which requires that if the original record of trial is "lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication." The Government submitted a copy of the original record, which contains a copy of the certificate of authentication by the military judge. The appellant has not provided any reason for us to doubt the accuracy or authenticity of the copy of the original record containing the authentication by the military judge, and we find none. The appellant has also not alleged any prejudice due to the submission of the copy of the record. We therefore find no reason to order the preparation of a new record of trial and hold that the authenticated copy of the record satisfies the requirements of R.C.M. 1104(c) in this case.

Conclusion

Accordingly, we affirm the findings of guilty and only so much of the sentence as provides for confinement for thirty days and reduction to pay grade E-1.

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court